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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICARDO AVILA, Defendant and Appellant.	A153139 (San Mateo County Super. Ct. No. 17SF007095)

A jury convicted defendant Ricardo Avila of grand theft (Pen. Code, § 487, subd. (a)). The trial court also found true two prior strikes (Pen. Code, §§ 667, 1170.12) and a prior prison term (Pen. Code, § 667.5, subd. (b)) alleged in the information, and sentenced Avila to 44 months in state prison. Avila contends the trial court violated his Sixth Amendment right to confront the witnesses against him by limiting defense cross-examination of the complaining witness. We reject this argument and affirm.

I. BACKGROUND

On August 8, 2017, Avila was charged by information with grand theft (Pen. Code, § 487, subd. (a)). The information also alleged two prior strikes (Pen. Code, §§ 667 and 1170.12) and a prior prison term (Pen. Code, § 667.5, subd. (b)).

Jury trial began on September 18, 2017. Complaining witness Maria Perez testified that on June 8, 2017, she was working as a nutritional assistant and community worker at a Women, Infants, and Children (WIC) office in Redwood City. She had been employed by a WIC office for 12 years but had only been at the Redwood City location for two months. As a nutritional assistant, Perez provided food and educational services

to mothers and their young children during pregnancy and until the child reached five years of age. She met with clients in a small cubicle. On the afternoon of June 8, Avila and Desirae Paige came to the WIC office to meet with Perez in her cubicle. They brought their infant child with them in a stroller. Paige was seated in a chair in the cubicle, and Avila was standing near the entrance to the cubicle. Paige asked Perez for a special kind of baby formula that WIC did not normally provide, and Perez left her cubicle to ask her supervisor for authorization. Perez was gone for approximately four or five minutes. She left her purse in her cubicle.

When Perez returned, Paige and Avila had moved from their original locations and were standing near her personal belongings. Perez told them both to have a seat and asked, "What's happening?" Paige was "very nervous and shaking." Paige remained standing and Avila went to the hallway entrance of the cubicle. Paige also retracted her request for special formula, saying, "Give me any type of formula, any formula is good for the baby" and "Any type is fine, and otherwise it's fine. It's fine. I don't need it." Perez noticed her purse looked different from how it was when she left the cubicle; after she returned, it was knocked over and "all the things [were] taken out of it." Although Perez tried to get Paige and Avila to remain, they both left quickly without any formula. Perez first followed Avila outside, trying to get a picture of him, and Paige came outside shortly after that.

Outside the building, Perez told them to return her things and she would not call the police or press charges. Paige repeatedly exclaimed, "I didn't do anything," and said to Avila, "You know that I didn't take the things." Paige told Avila to give Perez's things back to her, but he refused, asking her, "Do you think I'm stupid?" and telling Paige "no" repeatedly. Paige begged him and cried and said she needed the formula for the baby. When Avila left, he cursed at Perez, told her not to follow him, warning her that he knew where she worked. After Avila and Paige left, Perez returned to her cubicle and checked the contents of her purse. Several things were missing: $1500 dollars that she was planning to send to her sick mother in Dallas, some Safeway gift cards of different amounts, and two Michael Kors watches worth about $600 total.

On cross-examination by Avila's counsel, Perez admitted that she could not see what Avila or Paige did to her purse and never saw Avila with any of the items from her purse. She initially admitted she never saw Avila's hands inside her purse but then said she didn't know whether she had or not.

Avila's counsel also questioned Perez about the potential source of the money she claimed was missing from her purse. Perez testified that she does not have any other jobs other than her job at WIC, but also works on weekends doing "other jobs that they give me here and there." She said the type of job depends, but that it included "taking care of children." Avila's counsel also asked whether on "June 8th or just prior to that, even the month prior to that, were you working at any other jobs besides WIC during that time period?" After a prosecution objection was overruled, the court told Perez, "You can just answer that question." Perez pushed back, saying she didn't want to answer the question because "it has nothing to do with this." The court responded: "Ma'am, if I ask you to answer the question, you do have to answer it . . . . You don't have to give us any great detail. . . . just yes or no," to which Perez responded in the affirmative. Avila's counsel asked Perez who employed her on the weekends during this time, but an objection from the prosecutor was sustained on relevance grounds.

Defense counsel was also permitted to ask where the $1500 in cash came from. Perez testified that of the $1500 she had in her purse, $1100 was from savings that she kept at her home for emergencies, and she had obtained the remaining $400 from her bank within days of the theft. When asked why she carried two watches in her purse, Perez explained that they were gifts that she always carries them, and because she is a busy person, she brings her things to work and "fix[es]" herself up once at work. Perez said that although she does not usually carry $1500 with her, it was normal for her to carry a significant amount of cash in her purse.

Later, outside the presence of the jury, the court told parties it "want[ed] the record to be clear" that it sustained the objections because "the appearance to me and in front of the jury was that it was beginning to get demeaning to Miss Perez." The court further

stated it thought it "allowed enough leeway and enough questioning with respect to Miss Perez and this money and where it came from . . . ."

During closing argument, Avila's counsel conceded that a theft of some kind had occurred, but emphasized that the value of the alleged stolen property wasn't clear, and the case turned on the distinction between petty and grand theft—he told the jury: "I'm not going to insult your intelligence and say nothing happened here or that it's a case of mistaken identity, but the question again, and the important one, is the distinction between grand theft and petty theft. That's why we're here and the law distinguishes those two as by a dollar amount."

Defense counsel had two arguments as to why the jury should find Avila guilty of only petty theft. First, he argued that, even though Paige insisted she didn't take anything and accused Avila of taking everything, the jury couldn't be sure that Avila was responsible for taking all of the items. Second, counsel focused on Perez's demeanor while testifying. Counsel said that while he was "sure [Perez] is a nice lady when she is at work . . . [,] [w]e're just here to judge the accuracy of her testimony, and we all saw it. She was confused. She had difficulty answering questions clearly." Counsel added that Perez was "hostile, unwilling, [and] evasive" on cross-examination and insinuated that she was a witness who "seem[ed] to be willing to bend the truth, if not outright make stuff up." There was no evidence corroborating Perez's testimony about the items allegedly stolen, such as bank statements, testimony from Perez's daughter about the watches, or other receipts.

On September 22, 2017, the jury found Avila guilty of grand theft. On September 25, 2017, the court found true the alleged prior strikes and prior prison term. On December 1, 2017, the court denied Avila's *Romero*[1] motion and sentenced him to the low term of 16 months for the grand theft, doubled it due to the prior strike (Pen. Code, § 1170.12), and added one year for the prior prison term (Pen. Code, § 667.5, subd. (b)). The total term of imprisonment was 44 months. Avila filed a timely notice of appeal.

[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

II. DISCUSSION

"The Confrontation Clause of the Sixth Amendment gives the accused the right 'to be confronted with the witnesses against him.' This has long been read as securing an adequate opportunity to cross-examine adverse witnesses." (*United States v. Owens* (1988) 484 U.S. 554, 557.) The confrontation right guarantees that the defendant " ' "has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." ' " (*People v. Cromer* (2001) 24 Cal.4th 889, 897, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242–243.)

Despite the import of a defendant's right to confront adverse witnesses, "[i]t does not follow, of course, that the Confrontation Clause . . . prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*); accord *People v. Ledesma* (2006) 39 Cal.4th 641, 705; *People v. Memro* (1995) 11 Cal.4th 786, 867–868.) "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20; accord *People v. King* (2010) 183 Cal.App.4th 1281, 1314.) We will not find a trial court's limitation on cross-examination violates the Confrontation Clause "unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623–624.)

In Avila's case, we cannot say that the trial court's curtailing of defense cross-examination significantly altered the jury's impression of Perez's credibility. The trial

court allowed Avila's trial counsel to ask several questions relating to the income source of the money that was reported stolen. The court even went so far as to direct Perez to answer the question of whether she had jobs other than the one at WIC around the time the theft occurred. (See *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386–1387 [no error found where trial court permitted some questions by defense counsel but sustained objections to others because defense counsel still succeeded in attacking credibility of complaining witness].) The court was within its discretion to sustain the objections on relevance grounds to additional questions about source of income. We think the court's secondary reason for sustaining objections to the cross-examination, that the questions were "demeaning" to Perez, was also an appropriate use of the court's discretion to limit cross-examination "based on concerns about . . . harassment . . . ." (*Van Arsdall, supra,* 475 U.S. at p. 679.) Avila's defense counsel was still permitted to ask Perez how she accumulated the money and watches that were allegedly missing from her purse. Counsel apparently hoped that further cross-examination on this topic would undermine Perez's credibility on the key issue of how much cash she had in her purse, but his cross-examination had already elicited numerous inconsistencies in her testimony on that topic. We are unconvinced that there was a " ' real possibility' that pursuit of the excluded line of impeachment evidence would have done '[s]erious damage to the strength of the State's case' " (*id.* at p. 683, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 319)—beyond the damage that had already been done.

Avila cites to *Davis*, implying the facts of that case are similar enough to Avila's situation to warrant finding a violation of his right to confrontation. But the Supreme Court in *Davis* sought to determine "whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness" with that witness's probationary status as a juvenile, a fact which is typically protected by rules of confidentiality. (*Davis, supra,* 415 U.S. at p. 309.) The analysis in *Davis* was about the exclusion of a very specific type of impeachment evidence and did not deal with a limitation on cross-examination like the one we have here. We also disagree that Perez's testimony "went unchallenged" like the testimony in *Davis*. (*Id.* at

p. 314.) As the Attorney General points out, Avila's counsel successfully got Perez to admit (1) she had an obstructed view of her purse and the defendant's hands once she left her cubicle and (2) she never saw any of the missing items in either Paige or Avila's hands. Defense counsel also got Perez to testify inconsistently as to whether or not she saw Avila's hands inside her purse, which allowed counsel to argue in closing that Perez was an unreliable or untrustworthy witness.

Although a trial court is expected to allow cross-examination on any factor " 'which could reasonably lead the witness to present less than reliable testimony' " when dealing with questioning designed to impeach a witness, "[t]he constitutional right to confront and cross-examine adverse witnesses does *not* include the right to ask *wholly speculative* questions ungrounded in factual predicate even when posed in the quest to discredit a witness." (*People v. Schilling* (1987) 188 Cal.App.3d 1021, 1032, 1033, italics added.) Avila's trial counsel sought to discredit Perez by questioning her source of income, implying that she didn't in fact have the amount of money in her purse that she claimed. But that theory was speculative, and there was nothing else pointing to the possibility she might be lying about that particular point. "The ' " '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant's constitutional rights.' " ' " (*People v. Casares* (2016) 62 Cal.4th 808, 830, disapproved of on another ground in *People v. Dalton* (May 16, 2019, S046848) __ Cal.5th __ [2019 Cal. Lexis 3266].) Because, on this record, the trial judge was within his discretion under ordinary rules of evidence to limit cross of examination into where and how Perez obtained the money she had in her purse—and to set that limit by balancing the incremental impeachment value of further inquiry against respect for Perez's dignity—we see no violation of the Confrontation Clause.

III. DISPOSITION

Affirmed.

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STREETER, J.

WE CONCUR:

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POLLAK, P.J.

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TUCHER, J.